

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HENRY SAVAGE,
Plaintiff,
v.

No. C 05-02378 MHP

CITY OF BERKELEY, OFFICER V.
HUYNH, OFFICER P. HONG, Does 1-100,
BUILDING OPPORTUNITIES FOR SELF-
SUFFICIENCY, CEDRIC MCFARLAND,
Does 101-200,

MEMORANDUM & ORDER
**Re: Defendants' Motions for Summary
Judgment**

Defendants.

On June 10, 2005 plaintiff Henry Savage filed an action against the City of Berkeley, Officer Van Huynh, Officer Peter Hong, Doe defendants 1-100 (collectively "Berkeley defendants") as well as Building Opportunities for Self-Sufficiency ("BOSS"), its employee Cedric McFarland and Doe defendants 101-200 (collectively "BOSS defendants"). Plaintiff alleges that he sustained injuries on June 10, 2004 when defendant Officers Huynh and Hong attempted to evict him from his room at the 9th Street Transitional Housing Program ("9th Street") at the direction of defendant McFarland. Plaintiff's claims against the Berkeley defendants include federal state causes of action pursuant to the 42 U.S.C. section 1983 and 42 U.S.C. sections 1985-86; and state causes of action pursuant to California Civil Code section 51.7 and section 52.1 as well as common law claims of false detention, arrest or imprisonment and battery. Savage's claims against the BOSS defendants include state law causes of action for violations of California Health and Safety Code sections 50580-50912; California Civil Code sections 1940.2, 1942.5 and 1927¹; and Berkeley Municipal Code sections 13.76.050, 13.76.140. Finally, he brings the following common law claims against all of the

1 defendants: conversion; intentional infliction of emotional distress and negligence. Now before the
2 court are two motions for summary judgment by Berkeley defendants and BOSS defendants.

3
4 BACKGROUND²

5 I. Factual Background

6 Defendants officers Huynh and Hong are police officers for the City of Berkeley. Defendant
7 BOSS is a non-profit organization which operates homeless shelters and temporary transitional
8 housing in Berkeley, California. Defendant Cedric McFarland is employed by BOSS as a substance
9 abuse and mental health case manager. He is also the property manager at BOSS's 9th Street facility
10 where plaintiff applied for residency.

11 On approximately May 5, 2004 plaintiff moved into a room at the 9th Street Transitional
12 Program operated by BOSS. Defendants describe 9th Street as "short term stepping stone to more
13 permanent housing" McFarland Decl., Ex. B. Residents are accepted on a probationary basis
14 for three weeks. Id. If residents are not accepted into the program, the Tenant Agreement provides
15 that residents will be notified in writing. Id. The agreement further provides that residents must pay
16 the monthly fee on the first day of the month. Id. If a resident is having difficulties making the
17 payment, it is his or her responsibility to communicate that to the case manager. Id. The agreement
18 notifies the resident that failure to pay the monthly fee may result in expulsion from the program.
19 Id. Under the section titled "Disruptive Behavior," the agreement further states: "If participant
20 refuses to exit the program and vacate the premises, staff and/or house manager will call the police
21 and have he or she removed." Id. One of the conditions listed under "Termination/Expulsion From
22 Program Tenancy" in the agreement states that "non-payment of rent after the fifth day of the
23 month" will result in immediate termination and eviction from tenancy. Id.

24 On June 10, 2004 plaintiff alleges that he returned from work to his room at 9th Street to find
25 his door open and his belongings removed. Plaintiff also noticed police vehicles outside of 9th
26 Street. According to plaintiff, McFarland asked plaintiff to leave the premises. McFarland claims
27 that he asked plaintiff to leave 9th Street because he had not complied with the terms of the tenancy
28

1 agreement and his probationary period. BOSS Defs.’ Mot. at 4:18–22. McFarland also claims that
2 he notified plaintiff of the situation in writing on four occasions. Id. at 3:18, 3:23, 4:7–8, 4:18–19.
3 Plaintiff contends, however, that defendant McFarland tried to evict him in retaliation for plaintiff’s
4 reporting of a gas leak at 9th Street against McFarland’s instructions. Pl. Compl. at 5:1–7. When
5 McFarland asked plaintiff to leave on June 10, plaintiff responded that he would not leave without
6 being ordered to do so by a court. McFarland then asked Officers Huynh and Hong to tell plaintiff
7 that he was requested to leave the 9th Street facility. Orebic Dec., Exh. A at 38:1–25 (“Savage
8 Deposition”). The officers relayed the information, asked plaintiff his name and date of birth and
9 called that information into a dispatch operator at the Berkeley police station. Id., at 58:13–59:2.
10 The operator reported that plaintiff was a “sex offender out of Minnesota.” Id. at 59:5–7. The
11 officers questioned plaintiff about whether he was registered in California as a sex offender and
12 when he replied that he was not registered, the officers told him that he needed to register. Id. at
13 63:6–24. In one account of the events, plaintiff claims that after this encounter, he asked the officers
14 “if they were finished” and when they responded “yes” plaintiff turned to leave at which point he
15 was “slammed . . . to the floor.” Pl.’s Opp. at 7:2–5. In another account, plaintiff asserts that he
16 walked out of the room while one of the officers was talking to him. Savage Dep. March 16, 2007 at
17 87:3–13. Plaintiff recounts that the officer said “Hey, I’m talking to you” and when plaintiff didn’t
18 respond the officer “grabbed [his] right arm and slammed [him] on the floor.” Id. Plaintiff claims
19 that he told the officers that he was injured but they told him “[he was] just faking.” Pl.’s Opp. at
20 2:20–21. Plaintiff claims that he asked if he was under arrest and the officers responded that he was
21 under arrest. Id. Plaintiff then asked to speak to the officers’ supervisors and after he did so the
22 officers said that plaintiff was not under arrest. Id. at 2:22–25. Then plaintiff claims that the
23 officers told him to “get out of here boy.” Id. at 3:1. Plaintiff then left the premises and went to the
24 hospital where he alleges he was diagnosed as having a dislocated and bruised shoulder. Id. at
25 3:4–7.

26
27 II. Plaintiff’s Allegations
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1 On the basis of these events, plaintiff claims that defendant McFarland is liable to him for
2 unlawfully evicting him from 9th Street and illegally converting his property. Plaintiff alleges that
3 McFarland intentionally caused him emotional distress and was negligent in the performance of his
4 duties. Such acts, plaintiff claims, deprived him of his constitutional right to due process. Plaintiff
5 claims that BOSS is liable for the acts of McFarland under a theory of respondeat superior.

6 Against Officers Huynh and Hong, plaintiff claims deprivation of his constitutionally
7 protected rights to be free from unlawful arrest, to equal protection under the law and to due process.
8 Plaintiff claims that Officers Huynh and Hong committed tortious acts upon plaintiff by falsely
9 detaining him and committing battery upon him on account of his race. Plaintiff also claims that
10 Officers Huynh and Hong illegally converted his property. Plaintiff claims the City of Berkeley is
11 liable for the acts of its officers due to a City policy of ignoring the illegal acts of its officers and
12 improperly addressing the situation of officers violating individuals' constitutional rights. The City
13 is also liable to plaintiff, plaintiff asserts, on the theory of respondeat superior.

14
15 LEGAL STANDARD

16 Summary judgment is proper when the pleadings, discovery and affidavits show that there is
17 "no genuine issue as to any material fact and that the moving party is entitled to judgment as a
18 matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the
19 proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material
20 fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the
21 nonmoving party. Id. The party moving for summary judgment bears the burden of identifying
22 those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine
23 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On an issue for which the
24 opposing party will have the burden of proof at trial, the moving party need only point out "that
25 there is an absence of evidence to support the nonmoving party's case." Id.

26 Once the moving party meets its initial burden, the nonmoving party must go beyond the
27 pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a
28

genuine issue for trial.” Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving party’s allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). The court may not make credibility determinations, Anderson, 477 U.S. at 249, and inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991).

DISCUSSION

I. BOSS Defendants’ Motions for Summary Judgment and Partial Summary Judgment

BOSS defendants’ moved for summary judgment on seven of plaintiff’s causes of action on the basis that Savage was not a tenant and, therefore, that certain causes of action invoking the rights of a tenant are inappropriate. They further argue that they had good cause grounds for evicting plaintiff and that he received all of his property upon eviction. The court will first consider the BOSS defendants’ arguments challenging Savage’s status as a tenant and program participant and then consider their remaining arguments.

A. Evidentiary Objections

BOSS defendants raise several evidentiary objections to Savage’s evidence offered in opposition to their motion for summary judgment. Because the court did not consider the Police Review Commission Report, it need not rule on this objection. They also object to Savage’s Declaration because it was not signed by Savage in accordance with F.R.C.P 56(e) and Local Rule 7–5. **In fact, it appears that plaintiff has not signed the Declaration and he must do so in order to survive the motion for summary judgment.**

B. Savage’s Status as a Tenant and Program Participant

BOSS defendants assert that Savage was never a tenant or a participant in their program and, therefore, he may not properly invoke the statutory protections of a tenant. According to the BOSS defendants, then, his causes of action must fail for unlawful eviction and retaliation under Berkeley Municipal Code sections 13.76.130 and 13.76.14 (Ninth and Eleventh Causes of Action), for retaliation under California Civil Code section 1942.5 (Tenth Cause of Action) as well as unlawful

1 interference with his quiet enjoyment of rental property under California Civil Code sections 1927,
2 1940.2 (Twelfth, Thirteenth, and Fourteenth Causes of Action). Similarly, the BOSS defendants
3 allege that Savage was never formally accepted into the 9th Street Transitional program as a
4 program participant under the terms of the Transitional Housing Participant Act, California Health
5 & Safety Code sections 50580–50591 (Eighth Cause of Action). These defendants claim that they
6 are entitled to judgment as a matter of law on these claims because these statutory provisions do not
7 apply to plaintiff.

8 However, the court is not satisfied that the BOSS defendants have established that they are
9 entitled to judgment as a matter of law. While the parties dispute whether Savage was a tenant
10 within the terms of the Tenancy Agreement,³ it is not clear that demonstrating that Savage was not a
11 tenant per the Agreement would dispose of his claims. For instance, a cursory examination of the
12 Berkeley Municipal Code suggests that Savage may invoke the protections of sections 13.76.130
13 and 13.76.140 even if he does not meet the contractual definition of tenant. For the purposes of the
14 Code, tenant refers to tenants, lessees and other such parties as well as “any other person entitled to
15 the use or occupancy of such rental unit.” Berkeley Municipal Code § 13.76.040(I). In fact, one of
16 the stated purposes of section 13.76 is “to advance the housing policies of the City with regard to
17 low and fixed income persons, minorities, students, handicapped, and the aged.” Berkeley
18 Municipal Code § 13.76.030. Rental unit, as defined by the code, is “any unit in any real property,
19 including the land appurtenant thereto, rented or available for rent for residential use or occupancy
20 (including units covered by the Berkeley Live/Work Ordinance No. 5217-NS), located in the City of
21 Berkeley, together with all housing services connected with use or occupancy of such property such
22 as common areas and recreational facilities held out for use by the tenant.” Section 13.76.040(G). It
23 appears likely to the court that BOSS meets one of the Code’s exceptions, although the BOSS
24 defendants have not provided sufficient evidence for a conclusive determination. Section
25 13.76.050(L) excepts from section 13.76 of the Code:

26 Rental units in a facility owned or leased by an organization exempt from federal
27 income taxes under Section 501(c)(3) of the Internal Revenue Code that has the
28 primary purpose of operating a treatment, recovery, therapy, sanctuary or shelter
program for qualified clients, where such rental units are provided incident to the
client’s participation in the primary program and where the client has been informed
in writing of the temporary or transitional nature of the housing at the inception of

his or her participation in the program. However, except as may be preempted by the Transitional Housing Participant Misconduct Act (California Health and Safety Code Sections 50580 et. seq.) or other state or federal law, such rental units shall not be exempted from the terms of Section 13.76.130, Good Cause Required for Eviction. For purposes of Section 13.76.130.A.2, the client's continued eligibility for participation in the treatment, recovery, therapy, sanctuary or shelter program shall be deemed a material term of the client's rental agreement with the program's operator.

Even if the BOSS defendants were to establish that BOSS fit this exception, the statute dictates that transitional housing programs are not exempt from the terms of 13.76.130. Therefore, in the absence of any other evidence or argument, it appears to the court that Savage may bring a claim under section 13.76.130. Whether he may bring a claim under 13.76.140 has not been conclusively established. Accordingly, the BOSS defendants have not demonstrated that, as a matter of law, Savage may not invoke the protections of Berkeley Municipal Code sections 13.76.130 and 13.76.140.

BOSS defendants have not provided any support for their contention that Savage was not a tenant or hirer within the meaning of California Civil Code sections 1927, 1940.2, and 1942.5 where those terms appears. Section 1927 refers to "hirers" and is generally construed to apply to a landlord-tenant relationship.⁴ See, e.g., Guntert v. Stockton, 55 Cal. App. 3d 131 (1976). Section 1940.2, which prohibits acts of theft, extortion or menacing conduct by a landlord seeking to have tenant vacate dwelling, protects "tenants." Likewise section 1942.5 is directed at "lessees."⁵ These sections apply to "all persons who hire dwelling units located within this state including tenants, lessees, boarders, lodger, and others, however denominated." Cal. Civ. Code § 1940(a). Aside from the evidence previously mentioned, the BOSS defendants have not presented any arguments to show that Savage may not claim the protections under these three statutes.

The BOSS defendants also argue that Savage was not a program participant within the meaning of the Transitional Housing Misconduct Act, California Health & Safety Code section 50582(c). According to the statute, a program participant is

a homeless person [as defined by the statute] under contract with a program operator to participate in a transitional housing program and to use a dwelling unit in the program site. For the purposes of naming a defendant under this part, or a person to be protected under this part, "participant" shall include a person living with a participant at the program site. The contract shall specifically include the transitional housing program rules and regulations, a statement of the program operator's right of control over and access to the program unit

1 occupied by the participant, and a restatement of the requirements and procedures of this chapter.

2 Id. at § 50582(c). To support this argument, the BOSS defendants point to the terms of the Tenancy
3 Agreement, which state that acceptance into the program will be communicated in writing and the
4 fact that BOSS wrote to Savage to explain that he was not accepted in to the program. See Tenancy
5 Agreement, McFarland Dec., Exh. B; Letter to Savage, June 5, 2004, McFarland Dec., Exh. E.
6 Having not been accepted into the program pursuant to BOSS' rules and regulations, Savage was not
7 "under contract" with BOSS to participate in its programs as required by section 50582(c).
8 Accordingly, Savage may not pursue claims as a program participant under the Transitional Housing
9 Misconduct Act.

10 In sum, the court concludes that the BOSS defendants have established that Savage is
11 ineligible as a program participant under the Transitional Housing Misconduct Act. The BOSS
12 defendants have not established that Savage is ineligible to invoke the protections of California Civil
13 Code sections 1927, 1940.2, and 1942.5. The BOSS defendants motion for summary judgment is
14 GRANTED IN PART with respect to Savage's claim under the Transitional Housing Misconduct
15 Act and DENIED IN PART with respect to his claims under California Civil Code sections 1927,
16 1940.2, and 1942.5.

17 18 C. Good Cause

19 BOSS defendants raise a good cause defense to Savage's claims for unlawful eviction and
20 retaliation under both the Berkeley Municipal Code and his claims for unlawful retaliation and
21 interference with quiet enjoyment of his rental property under the California Civil Code. They argue
22 that Savage's violation of a substantial term of the Agreement, namely failure to pay rent, is a good
23 cause ground for evicting Savage. Savage, however, has submitted a declaration asserting that he
24 had paid the necessary program fees or attempted to do so. Savage Dec. at ¶¶ 15–16. He further
25 states in his declaration that the actions taken against him by BOSS and defendant McFarland were
26 in retaliation for plaintiff's complaint about the gas leak. Id. at ¶¶ 16–20. Whether Savage was
27 evicted for good cause and whether he was retaliated against for his complaint are questions of fact.
28 Because plaintiff's declaration has gone beyond the pleadings and, by declaration, "set forth specific

1 facts showing that there is a genuine issue for trial,” Fed. R. Civ. P. 56(e), BOSS defendants’ motion
2 for summary judgment as to the unlawful eviction and retaliation claims is DENIED.

3
4 D. Conversion Claim

5 Finally, BOSS defendants assert that they are entitled to summary judgment on plaintiff’s
6 conversion claim because he signed a document stating that he had retrieved all of his personal
7 belongings. Therefore, defendants claim, there is no triable issue of fact as to whether defendants
8 destroyed or otherwise disposed of plaintiff’s personal belongings. Plaintiff stated in his declaration,
9 however, that he “did not receive [his] bicycle, some of his clothing, food and other items.” Savage
10 Dec., at ¶¶ 20–23. Whether or not all of plaintiff’s belongings were returned to him is, therefore, a
11 disputed issue of material fact. Because plaintiff has rebutted defendants’ assertion in the form of
12 admissible evidence, summary judgment must be denied.

13 The court notes that the BOSS defendants have raised no arguments for granting summary
14 judgment as to plaintiff’s claims for intentional infliction of emotional distress (Sixteenth Cause of
15 Action) or for negligence.

16
17 II. Berkeley Defendants’ Motion for Summary Judgment

18 Berkeley defendants have also moved for summary judgment on the claims plaintiff asserts
19 against them. Berkeley defendants first contend that they are entitled to summary judgment on
20 plaintiff’s unlawful detention claims because the officers had reasonable suspicion to detain
21 plaintiff. Berkeley defendants further assert that the officers are entitled to qualified immunity.
22 They also argue that plaintiff has not alleged facts sufficient to establish a cause of action for several
23 claims: substantive due process, intentional infliction of emotional distress, equal protection, race-
24 based violence, a Monell claim, conspiracy, and conversion. Finally, Berkeley defendants argue that
25 plaintiff has not stated a viable claim for relief against them on the basis of negligence because the
26 officers had no duty to plaintiff to investigate his situation before acting and the officers are immune
27 from such suits.
28

1 A. Evidentiary Objections

2 The Berkeley defendants raise several objections to the declaration submitted by Savage in
3 opposition to their motion as well as to documents attached to the Taylor declaration. First, they ask
4 the court to strike the entirety of Savage's declaration for failure to sign the copy served on the
5 Berkeley defendants. As noted above, plaintiff must sign the declaration in order to survive
6 summary judgment on the affected claims. They also ask that the statements by Savage describing
7 the statements of his doctor be stricken as hearsay testimony. The court agrees. Finally, they argue
8 that Savage's declaration of November 27, 2006 contradicts his earlier deposition testimony that
9 indicated that Officer Huynh grabbed Savage's arm after Savage walked away during Huynh's
10 questioning. Plaintiff cannot raise a material issue in a declaration by contradicting his own sworn
11 testimony. Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 237 (7th Cir. 1991). Therefore,
12 Savage's description of his doctor's statements as well as his statements about the events
13 immediately preceding Huynh's use of force are stricken. Because the court has not relied on either
14 the medical record offered by Savage or the Berkeley Civilian Police Review Commission's report,
15 it need not rule on these objections.

16
17 B. Plaintiff's Section 1983 Claims

18 Savage claims that the Berkeley defendants violated his constitutional rights when Officers
19 Huynh and Hong detained him. Pursuant to 42 U.S.C. section 1983, he seeks damages for violations
20 of the Fourth Amendment, Equal Protection Clause, and the Due Process Clause (First Cause of
21 Action) for unlawful detention and excessive force.

22 1. Unlawful Detention Claims

23 Berkeley defendants claim that officers are entitled to qualified immunity on the unlawful
24 detention and excessive force claims. A police officer is entitled to qualified immunity based on a
25 determination of "whether a constitutional right would have been violated on the facts alleged;
26 second, assuming the violation is established, the question [is] whether the right was clearly
27 established." Saucier v. Katz and In Defense of Animals, 533 U.S. 194, 200 (2001). Whether the
28 right was clearly established "must be [determined] in light of the specific context of the case, not as

1 a broad general proposition; and it too serves to advance understanding of the law and to allow
2 officers to avoid the burden of trial if qualified immunity is applicable.” Id. at 201. In Saucier, the
3 Supreme Court instructed lower courts not to deny summary judgment any time there was an
4 outstanding question of material fact. Assuming there was a constitutional violation, the inquiry is
5 whether the right violated is so clearly established that it was unreasonable for the officer to have
6 violated it. Id. at 202, 207.

7 Assuming plaintiff had a legal right to be at 9th Street, the court must determine whether the
8 officers’ actions were reasonable in this context. The First Circuit confronted an analogous fact
9 pattern in Higgins v. Penobscot Co. Sheriff’s Dept., 446 F.3d 11 (1st Cir. 2006) (concluding that
10 police did not act unreasonably in evicting plaintiff from property, where it was later determined that
11 plaintiff was rightfully on property). The dispositive question of the officer’s reasonableness was
12 whether the officer “could be found to have known that it was an unlawful eviction.” Id. at 9.
13 Based on the fact that witnesses offered evidence in support of their claim that plaintiff was
14 trespassing and the only evidence plaintiff provided of his right to be on the property was “a
15 conclusory verbal claim of entitlement,” the court held that the deputy’s decision to believe the
16 witnesses and “to defuse the situation by asking [plaintiff] to leave . . . was neither plainly
17 incompetent nor involved a deliberate violation of the law.” Id. at 11.

18 In the instant case, Savage was detained based on the claims of the 9th Street staff and
19 McFarland that he had violated program rules and was required to leave. Savage, like the plaintiff in
20 Higgins, responded with a conclusory verbal claim of entitlement. Savage Dec. at ¶¶ 9–11. A
21 determination of reasonableness is not based on the subjective experience of the officers but whether
22 the actions were reasonable from the eyes of a reasonable officer in a similar situation. Anderson v.
23 Creighton, 483 U.S. 635, 637 (1987). The court finds that since the officers were unaware of the
24 particular law governing evictions from transitional housing programs, and that the officers’
25 determination that the 9th Street program staff were credible in their claim that plaintiff was
26 trespassing, their actions were reasonable.

27 Accordingly, the officers are entitled to qualified immunity from liability on plaintiff’s claim
28 of unlawful detention.

1 2. Excessive Force Claim

2 The next inquiry is whether the officers are also entitled to qualified immunity on Savage's
3 claim of excessive force. To determine whether the force used in a particular seizure is reasonable
4 under the Fourth Amendment, courts must carefully balance "the nature and quality of the intrusion
5 on the individual's Fourth Amendment interests against the countervailing governmental interests at
6 stake." Graham v. Connor, 490 U.S. 386, 396 (1989) (internal quotations omitted). The proper
7 application of the test of reasonableness under the Fourth Amendment requires careful attention to
8 the facts and circumstances of each particular case, including the severity of the crime at issue,
9 whether the suspect poses an immediate threat to the safety of the officers or others and whether he
10 is actively resisting arrest or attempting to evade arrest by flight. Id.

11 As noted in the court's ruling on the Berkeley defendant's evidentiary objections, the court
12 will take plaintiff's deposition testimony, supported by defendants' evidence, as true for the purpose
13 of the excessive force claim. Berkeley defendants claim that plaintiff attempted to leave the room
14 while the officers were questioning him about his sex-offender status and as a result Hyunh grabbed
15 Savage's arm to detain him. Defs.' Exh. B at 2:13-20. Savage characterizes the officers' restraint
16 as "slamm[ing] him on the floor." Savage Dec. ¶¶ 14-16. He offers no other description of what
17 "slamming" him means and does not describe in anymore detail what happened after Officer Hyunh
18 grabbed his arm. Id. Plaintiff claims that after the incident on June 10, 2004 he "went immediately
19 to Kaiser Hospital" and subsequently suffered from a "dislocated and bruised shoulder." Savage
20 Dec. at ¶¶ 10-11. The officers, in turn, contest this characterization of their detention of Savage and
21 assert that no force was used other than that required to grasp Savage's arm. See Hyunh Dec. ¶ 12.

22 Even assuming that Savage's characterization is accurate and that he suffered injury as a
23 result of his detention, the officers' actions were reasonable in light of current law. Similar to the
24 situation in Saucier, the officers were acting under the presumption that it was necessary to continue
25 questioning the defendant and to advise him of the need to register as a sex offender. By leaving
26 him from leaving. See Saucier, 533 U.S. at 209. The court concludes that preventing Savage from
27 leaving during the questioning, even where the force involved rose to the level alleged by Savage,
28

1 was reasonable under the circumstances. Savage has presented no case demonstrating a “clearly
2 established rule prohibiting the officer[s] from acting as [they] did, nor [is the court] aware of any
3 such rule.” Id. at 209.

4 Thus, the officers are entitled to qualified immunity on the issue of excessive force and
5 Berkeley defendants’ motion for summary judgment on plaintiff’s section 1983 claim of excessive
6 force is GRANTED.

7 3. Substantive Due Process Claim

8 Similar to Savage’s claim for excessive force, he argues that the officers violated due process
9 in their use of force to detain him. To establish such a claim, Savage must demonstrate that the
10 officers exhibited behavior so extreme that it “shocks the conscience.” County of Sacramento v.
11 Lewis, 523 U.S. 833, 8434 (1998) (concluding that in a similar context plaintiff must allege intent to
12 injure which would “rise to the conscience-shocking level”). For the same reasons that the court has
13 determined that the officers acted reasonably in using force to detain Savage, their conduct did not
14 rise to the level of shocking the conscience.

15 The court GRANTS the defendants’ motion for summary judgment as to plaintiff’s
16 substantive due process claim.

17 4. Equal Protection Claim

18 Savage also argues that the officers violated his rights to equal protection of the laws when
19 they referred to him as “boy,” a comment he alleges was racially motivated, and when Hyunh
20 threatened to arrest Savage the next time he saw Savage. Savage Dec. ¶ 12, 14. In contrast to the
21 arguments presented by Berkeley defendants, Savage is not required to present general evidence that
22 other people similarly situated to him were not abused in a similar way in order to proceed to trial on
23 that claim. See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14
24 (1977) (“[A] consistent pattern of official racial discrimination is [not] a necessary predicate to a
25 violation of the Equal Protection Clause. A single invidiously discriminatory governmental act . . .
26 would not necessarily be immunized by the absence of such discrimination in the making of other
27 comparable decisions.”) Savage sets forth specific facts, namely his testimony that he was harassed
28 in racial terms, from which a jury could find that the defendants’ conduct was motivated by a

1 discriminatory purpose. See Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987)
2 (holding that contentions that “police officers called him ‘nigger’ and ‘coon’ . . . are sufficient to
3 demonstrate racial animus.”). To succeed on summary judgment, it is therefore the burden of the
4 defendants to show by undisputed evidence that there was no discriminatory effect—that the search,
5 detention and manner of dealing with Savage would have taken place even without a discriminatory
6 animus—or was justified by some compelling governmental interest. Village of Arlington Heights,
7 429 U.S. at 271 n.21 (explaining that proof of discriminatory purpose “shift[s] to the [defendants]
8 the burden of establishing that the same decision would have resulted even had the impermissible
9 purpose not been considered”). Defendants have failed to establish by undisputed evidence that any
10 compelling governmental purpose justified their alleged actions. Moreover, if a jury believed
11 Savage’s version of the events, it could conclude that he would not have been subjected to the same
12 treatment absent a discriminatory purpose.

13 The court therefore DENIES summary judgment on Savage’s equal protection claim.

14 4. Monell claim

15 Savage’s second cause of action alleges violations of his constitutional rights by the City of
16 Berkeley. He contends that acts of the two officers were caused by a custom, policy, pattern or
17 practice of indifference to constitutional violations. Berkeley defendants ask the court to grant
18 summary judgment on the basis that Savage has not presented any evidence of a custom or policy as
19 required for respondeat superior liability pursuant to Monell v. Dep’t of Soc. Services of City of
20 New York, 436 U.S. 658, 691 (1978). While Savage argues that the police department had a custom
21 of inadequate training on the civil nature of eviction proceedings, he provides no evidence sufficient
22 to defeat summary judgment.

23 Defendants request for summary judgment on the *Monell* claim is GRANTED.

24
25
26 C. Plaintiff’s section 1985 Claims

27 Savage’s seventh cause of action alleges a conspiracy to deprive him of equal protection
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1 among the two officers, the City of Berkeley and unnamed defendants, Does 1-100. In particular,
2 conspiracy requires evidence of an overt act in furtherance of the conspiracy. 42 U.S.C. § 1985(3).
3 Savage has failed to provide any evidence of such a conspiracy.

4 The court GRANTS defendants' request for summary judgment as to this claim.

5
6 B. State law claims

7 The Berkeley defendants also ask the court for summary judgment on Savage's state law
8 claims. As these claims raise many of the same issues as his federal claims, the court will address
9 these briefly.

10 1. Tort Claims

11 Plaintiff alleges a number of tort violations against the officers: false detention (Third Cause
12 of Action); battery (Fourth Cause of Action); intentional infliction of emotional distress (Sixteenth
13 Cause of Action) and negligence (Seventeenth Cause of Action). Each of these claims is premised
14 on Savage's allegation that the officers failed to investigate whether Savage had a right to be at 9th
15 Street before detaining him. Defendants argue that the officers cannot be liable in tort because the
16 decision to detain was a discretionary act even if the officers abused their discretion. Watts v.
17 County of Sacramento, 136 Cal. App. 3d 232 (1982). In concluding that officers had evicted a
18 person with a right to possession of the property, the court noted that "a public employee is not
19 liable for an injury resulting from his act or omission where the act or omission was the result of the
20 exercise of the discretion vested in him, whether or not such discretion be abused." Id. at 235.
21 (internal citations omitted). The facts of the Watts case are analogous to plaintiff's case. Plaintiff
22 claims that Officers Huynh and Hong did not appropriately investigate whether or not plaintiff had a
23 legal right to be at 9th Street and as such illegally detained him. Although Officers Huynh and Hong
24 may have been mistaken in their assessment of the situation and relied on McFarland's allegedly
25 erroneous information, their decision to order plaintiff to leave was clearly a discretionary act that
26 falls within the holding of Watts. Therefore, Officers Huynh and Hong are immune from tort
27 liability for acts committed in their discretion.
28

1 Accordingly, the court GRANTS defendants' request for summary judgment as to Savage's
2 claim for false imprisonment, battery, intentional infliction of emotional distress, and negligence.

3 2. California Civil Code Sections 51.7 and 52.1

4 Savage presents two statutory claims, his fifth and sixth causes of action, under California
5 Civil Code sections 51.7 and 52.1. The Berkeley defendants argue that his claim under Civil Code
6 section 51.7, which prohibits racially motivated violence, must fail because Savage has not
7 presented evidence of racial animus. The court disagrees. For the same reasons that the court
8 concluded that Savage had alleged fact sufficient to survive summary judgment on his equal
9 protection claim, it concludes that a jury could infer racial animus from the officers' calling Savage
10 "boy," an alleged derogatory reference to his race.

11 Similarly, Civil Code Section 52.1(a) prohibits the use of violence in the interference with a
12 person's constitutional rights. Berkeley defendants argue that Savage must show that the officers
13 threatened violence against him. Cal. Civ. Code § 42.1(j) (requiring threat of violence for violation
14 of section 42.1(a)). The court finds that Savage has met his burden of showing violence or threat of
15 violence. Based on Savage's allegations that the officers used force to detain him, made a racial
16 comment, and made threats to arrest him in the future, he has sufficiently demonstrated violence or
17 threat of violence.

18 Accordingly, the court DENIES defendants' motion for summary judgment as to claims
19 under California Civil Code sections 51.7 and 52.1.

20 3. Conversion

21 In his fifteenth cause of action, Savage alleges that the Berkeley defendants deprived him of
22 his personal property. However, Savage has failed to provide evidence of the Berkeley defendants'
23 involvement in any alleged deprivation sufficient to survive summary judgment.

24 Accordingly, the court GRANTS defendants' request for summary judgment.

25
26 CONCLUSION

27 **Plaintiff is given notice that he must file a signed copy of his declaration within ten (10)**
28

1 days of the filing of this order or suffer loss of some or all of his claims depending upon the
2 claims to which the declaration is critical, which can be determined from a review of this
3 order. Failure to do so will result in a modification of this order as pertinent. The order
4 herein assumes the filing of a signed declaration.

5 The Court orders as follows:

6 1) The BOSS defendants' motion for summary judgment is GRANTED IN PART with
7 respect to Savage's claims under the Transitional Housing Misconduct Act and DENIED IN PART
8 with respect to the remaining claims against the BOSS defendants.

9 2) The Berkeley defendants' motion is GRANTED IN PART with respect to his claims for
10 unlawful detention, excessive force, his Monnell claim, claims for false imprisonment, battery,
11 intentional infliction of emotional distress, negligence and conversion.

12 3) The Berkeley defendants' motion is DENIED IN PART with respect to his claims for
13 equal protection violations as well as violations of California Civil Code sections 51.7 and 52.1.

14
15
16 IT IS SO ORDERED.

17
18
19 Dated: March 22, 2007

20 
21 _____
22 MARILYN HALL PATEL
23 United States District Court Judge
24 Northern District of California
25
26
27
28

ENDNOTES

1. Plaintiff's claim for breach of covenant of quiet enjoyment in contract pursuant to California Civil Code section 1927 is brought against BOSS itself and not against any of the other BOSS defendants. He separately alleges a cause of action under section 1927 in tort against all of the BOSS defendants.

2. All facts cited herein are taken from the complaint unless otherwise noted.

3. According to the BOSS defendants, Savage was never a tenant or a program participant. Savage was residing at 9th Street as part of the initial, three week probationary period pursuant to the Agreement between BOSS and Savage. See Tenancy Agreement, Boss Def's Mot., Ex. B, 1 ("The first three weeks of my stay at 9th Street are probationary and do not result in tenancy."). His probationary status is insufficient to claim the statutory protections afforded a tenant, they argue. In response, Savage admits that he was a resident on probationary status for the requisite three weeks and contends that upon complying with the terms of the Tenancy Agreement and paying his June he became a tenant. Savage Decl., Nov. 27, 2006, at 3:17-4:4. Furthermore, the agreement states that Savage's probationary period ended on May 26, 2004 and that on or before that date, he would be informed whether he was accepted into the program or written notification of his termination from the program. Tenancy Agreement, McFarland Decl., Ex. B, 1. On May 25, 2004 Savage's probationary status was extended for an additional two weeks provided that he meet certain conditions. Letter to Savage, May 25, 2004, McFarland Decl., Ex. D. Ten days later McFarland wrote to Savage to inform him that he was not accepted into the program for failure to comply with certain terms. Letter to Savage, June 5, 2004, McFarland Decl., Ex. E. The letter informed Savage of how to appeal this decision and, failing that, instructed Savage to leave the facility within five days. Id. Savage disputes the fact that he had failed to comply with the conditions set forth in the June 5th letter and contends that his compliance indicates that he was a tenant at the time the incident on June 10th. Savage Decl. ¶¶ 15-20. He further argues that his status was revoked in retaliation for reporting a gas leak in the 9th street facility. Savage Decl. ¶ 10. BOSS defendants dispute Savage's assertion that he reported the gas leak. McFarland Second Decl. ¶ 4 (asserting that he had no conversations with Savage about the gas leak and that a BOSS employee reported the leak to the gas company).

4. That provision reads in its entirety as follows:

An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

Cal. Civ. Code § 1927

5. That provision reads as follows:

1 (a) If the lessor retaliates against the lessee because of the exercise by the lessee of his
2 rights under this chapter or because of his complaint to an appropriate agency as to
3 tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the
4 payment of his rent, the lessor may not recover possession of a dwelling in any action or
5 proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any
6 services within 180 days of any of the following:

7 (1) After the date upon which the lessee, in good faith, has given notice pursuant to
8 Section 1942, or has made an oral complaint to the lessor regarding tenantability.

9 (2) After the date upon which the lessee, in good faith, has filed a written complaint, or
10 an oral complaint which is registered or otherwise recorded in writing, with an
11 appropriate agency, of which the lessor has notice, for the purpose of obtaining
12 correction of a condition relating to tenantability.

13 (3) After the date of an inspection or issuance of a citation, resulting from a complaint
14 described in paragraph (2) of which the lessor did not have notice.

15 (4) After the filing of appropriate documents commencing a judicial or arbitration
16 proceeding involving the issue of tenantability.

17 (5) After entry of judgment or the signing of an arbitration award, if any, when in the
18 judicial proceeding or arbitration the issue of tenantability is determined adversely to the
19 lessor.

20 In each instance, the 180-day period shall run from the latest applicable date referred to
21 in paragraphs (1) to (5), inclusive.

22
23 (b) A lessee may not invoke subdivision (a) more than once in any 12-month period.

24
25 (c) It is unlawful for a lessor to increase rent, decrease services, cause a lessee to quit
26 involuntarily, bring an action to recover possession, or threaten to do any of those acts,
27 for the purpose of retaliating against the lessee because he or she has lawfully organized
28 or participated in a lessees' association or an organization advocating lessees' rights or
has lawfully and peaceably exercised any rights under the law. In an action brought by or

1 against the lessee pursuant to this subdivision, the lessee shall bear the burden of
2 producing evidence that the lessor's conduct was, in fact, retaliatory.

3
4 (d) Nothing in this section shall be construed as limiting in any way the exercise by the
5 lessor of his or her rights under any lease or agreement or any law pertaining to the hiring
6 of property or his or her right to do any of the acts described in subdivision (a) or (c) for
7 any lawful cause. Any waiver by a lessee of his or her rights under this section is void as
8 contrary to public policy.

9
10 (e) Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of
11 a dwelling and do any of the other acts described in subdivision (a) within the period or
12 periods prescribed therein, or within subdivision (c), if the notice of termination, rent
13 increase, or other act, and any pleading or statement of issues in an arbitration, if any,
14 states the ground upon which the lessor, in good faith, seeks to recover possession,
15 increase rent, or do any of the other acts described in subdivision (a) or (c). If the
16 statement is controverted, the lessor shall establish its truth at the trial or other hearing.

17
18 (f) Any lessor or agent of a lessor who violates this section shall be liable to the lessee in
19 a civil action for all of the following:

20
21 (1) The actual damages sustained by the lessee.

22
23 (2) Punitive damages in an amount of not less than one hundred dollars (\$100) nor more
24 than two thousand dollars (\$2,000) for each retaliatory act where the lessor or agent has
25 been guilty of fraud, oppression, or malice with respect to that act.

26
27 (g) In any action brought for damages for retaliatory eviction, the court shall award
28 reasonable attorney's fees to the prevailing party if either party requests attorney's fees
upon the initiation of the action.

(h) The remedies provided by this section shall be in addition to any other remedies
provided by statutory or decisional law.

Cal. Civ. Code § 1942.5